IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 70-13

WINFIELD DUNN, Governor of the State of Tennessee; DAVID M. PACK, Attorney General of the State of Tennessee; JOE C. CARR, Secretary of State of the State of Tennessee; SHIRLEY G. HASSLER, Coordinator of Elections of the State of Tennessee; GEORGE C. THOMAS, Chairman of the State Board of Elections; LYTLE LANDERS and JAMES E. HARPSTER, Members of the State Board of Elections; THOMAS W. JARRELL, Chairman of Davidson County Election Commission; ALBERT H. THOMAS, IMOGENE MUSE, J. GRANSTAFF DALE, and JOHN H. HENDERSON, Members of the Davidson County Board of Elections; and MARY F. FERRELL, Registrar-at-Large of Davidson County, State of Tennessee,

Appellants,

vs.

JAMES F. BLUMSTEIN,

Appellee.

On Appeal from the Three Judge United States District Court for the Middle District of Tennessee, Nashville Division

MOTION TO AFFIRM

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OCTOBER TERM, 1970

No. 769

WINFIELD DUNN, Governor of the State of Tennessee; DAVID M. PACK, Attorney General of the State of Tennessee; JOE C. CARR, Secretary of State of the State of Tennessee; SHIRLEY G. HASSLER, Coordinator of Elections of the State of Tennessee; GEORGE C. THOMAS, Chairman of the State Board of Elections; LYTLE LANDERS and JAMES E. HARPSTER, Members of the State Board of Elections; THOMAS W. JARRELL, Chairman of Davidson County Election Commission; ALBERT H. THOMAS, IMOGENE MUSE, J. GRANSTAFF DALE, and JOHN H. HENDERSON, Members of the Davidson County Board of Elections; and MARY P. FERRELL, Registrar-at-Large of Davidson County, State of Tennessee,
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MOTION TO AFFIRM

Appellee in the above-entitled case moves this court to affirm the judgment of the statutory three-judge District Court on the ground that the District Court's decision is patently correct.

I. RECENT LOWER COURT DECISIONS SUPPORT THE DECISION OF THE DISTRICT COURT IN THIS CASE

In the last two years, there has been a great deal of concern expressed about durational residency requirements both in litigation and legislation. In 1969, this Court had an opportunity to review durational residency requirements in the context of presidential and vice-presidential elections, but the Court ruled that the issue was moot since Colorado had altered its residency period in the interim, and the plaintiffs would not have been disenfranchised under the terms of the revised statute. **Hall v. Beals,** 396 U. S. 45 (1969). While **Hall** was pending before this Court, the House Judiciary Committee decided against including anything regarding durational residency in the Voting Rights Act Amendments for two reasons. First, since the Supreme Court was about to render a decision on the constitutionality of durational residency requirements for presidential and vice-presidential elections, the Committee wished to await a clarification of the applicable constitutional principles before recommending legislation in the residency area. Second, as a political matter, Chairman Celler placed a high premium on passage of an undiluted extension of the Voting Rights Act of 1965 and sought to avoid any amendments which might delay or impede the swift re-enactment of the Voting Rights Act. When this Court disposed of **Hall** without a decision on the merits, Congress amended the bill reported out of Committee so as to impose durational residency maxima for presidential and vice-presidential elections. These amendments were recently upheld as valid by this Court. **United States v. Arizona,** 39 U. S. L. W. 4027 (U. S. Dec. 21, 1970).

The state, in its Jurisdictional Statement, takes the District Court to task for its explanation of the above Con-

gressional-judicial interaction (footnote 2, page 10 of the District Court's opinion). The District Court did not attempt to explain why the Congress limited the applicability of the residency maximum to presidential and vice-presidential elections. Despite the state's contention to the contrary, the District Court attempted to show why Congress had legislated in the residency area despite the decision of the House Judiciary Committee not to incorporate amendments restricting voter residency periods. Why Congress chose to restrict the extent of the residency provisions of the Voting Rights Act to presidential and vice-presidential elections is a matter of pure conjecture. Fear of political obstruction if too much were attempted at one time may have been the motivation. Whatever its intent, Congress did speak out loud and clear in its findings as to the evil of durational residency requirements with respect to voting. And the District Court below, recognizing the massive disfranchisement, found Tennessee's three month county and one year waiting periods unconstitutional as an overly broad infringement of fundamental constitutionally protected liberties.

The District Court's opinion is in accord with a substantial majority of the lower courts which recently have dealt with durational residency requirements for voting. Three-judge courts in six states and the District of Columbia as well as a state court in California have all found waiting periods for voting unconstitutional. **Burg v. Canniffe**, 315 F. Supp. 380 (D. Mass. July 8, 1970); **Blumstein v. Ellington**, ... F. Supp. ... (M. D. Tenn. Aug. 31, 1970); **Hadnott v. Amos**, ... F. Supp ... (N. D. Ala. Oct. 19, 1970); **Affeldt v. Whitcomb**, ... F. Supp. ... (N. D. Ind. Oct. 20, 1970); **Kohn v. Davis**, ... F. Supp. ... (D. Vt. Oct. 26, 1970); **Bufford v. Holton**, ... F. Supp. .... (E. D. Va. Oct. 27, 1970); **Lester v. Bd. of Elections**, ... F. Supp. ... (D. D. C. Nov. 20, 1970); **Keane v. Mihaly**, ... Cal. Rptr. ... (1st App. Dist., Div. 4, Ct. of App. Oct.

7, 1970). Only three courts ruling on the merits have upheld durational residency requirements for voting (**Cocanower v. Marston,** ... F. Supp. ... (D. Ariz. Sept. 21, 1970); **Epps v. Logan,** ... F. Supp. ... (W. D. Wash. Oct. 30, 1970); **Fitzpatrick v. Bd. of Election Commissioners,** ... F. Supp. ... (N. D. Ill. Civ. No. 70C 2434)) and one of those opinions (the one in Washington) relied on the Arizona ruling since one of the judges who sat in Washington also sat in Arizona. There have been two other adverse rulings at earlier stages of litigation, one denying a preliminary injunction (**Piliavin v. Hoel,** ... F. Supp. ... (W. D. Wisc. Oct. 27, 1970)) as the District Court did here, and one refusing to convene a three judge court. **Sirak v. Brown,** ... F. 2d ... (6th Cir. Civ. No. 70-164). The cases invalidating the waiting period requirements have followed the reasoning of **Shapiro v. Thompson,** 394 U. S. 618 (1969), applying strict review, while the minority of lower courts has refused to accept the rationale of **Shapiro,** clinging instead to an overly rigid view of the continued vitality of **Pope v. Williams,** 193 U. S. 621 (1903). In short, it is the District Court below, and the majority of other courts which recently have decided voter residency issues, which are clearly applying the appropriate constitutional formula. Therefore, this Court should affirm the decision of the three judge panel below without further ado. Cf. **Cole v. Newport Housing Authority,** ... F. 2d ... (1st Cir. Dec. 15, 1970) (2 year waiting period for application to public housing unconstitutional); **Keenan v. Bd. of Law Examiners** ... F. Supp. ... (E. D. N. C. Oct. 2, 1970) (one year residency period before being licensed to practice law unconstitutional); **Webster v. Wofford,** ... F. Supp. ... (N. D. Ga. Dec. 31, 1970) (one year residency period before being licensed to practice law unconstitutional).

II. THE DISTRICT COURT APPLIED THE APPROPRIATE CONSTITUTIONAL STANDARD

The District Court held that Tennessee's durational residency requirement must be judged for equal protection purposes under the so-called compelling state interest formula. This test is applicable in two broad areas of cases: where the classification involved is based on suspect criteria; and where the deprivation at stake is of a fundament right. Both triggering elements are present in this case. In **Shapiro v. Thompson**, 394 U. S. 618 (1969), this Court declared that classification on the basis of recent interstate travel was inherently suspect. 394 U. S. at 661 (Harlan, J., dissenting.) The District Court below, consistent with **Shapiro**, made a similar finding. The District Court also found that the waiting period deprived plaintiff-appellee and the class which he represents of the fundamental right to vote. The deprivation was an absolute denial of the franchise, like that in **Evans v. Cornman**, 398 U. S. 419 (1970); **Kramer v. Union Free School District**, 395 U. S. 621 (1969), and **Carrington v. Rash**, 380 U. S. 89 (1965). This absolute disfranchisement is as much a deprivation of a fundamental right as is the dilution of the vote. **Hadley v. Junior College District**, 397 U. S. 50 (1970); **Wells v. Rockefeller**, 394 U. S. 542 (1969); **Kirkpatrick v. Preisler**, 394 U. S. 526 (1969); **Avery v. Midland County**, 390 U. S. 474 (1968); **Reynolds v. Sims**, 377 U. S. 533 (1964). Of course, not just any indirect impediment to voting will trigger strict review. The traditional test, for example, still applies where the alleged deprivation of the right to vote is no more than the refusal to supply absentee ballots. **McDonald v. Bd. of Election**, 394 U. S. 802 (1969). But no such indirect burden is imposed by Tennessee's waiting period. There is no way that a bona fide resident can controvert the conclusive presumption of ineligibility, so the deprivation is

of the franchise itself, a fundamental right. Cf. **Carrington v. Rash**, 380 U. S. 89 (1965).

Although the District Court did not reach the issue, **but see Kohn v. Davis**, ... F. Supp. ... (D. Vt. Oct. 26, 1970), another basis for applying strict review in the case of durational residency requirements for voting is that it infringes on the constitutionally fundamental right of interstate travel. **United States v. Guest**, 383 U. S. 745 (1966). The sole, incontrovertible basis of classification is recent interstate movement. No other criteria are germane, nor can the Election Commission waive this prerequisite upon any showing by a prospective voter who is a new resident. While the waiting period may not deter mobile citizens from changing residences, it certainly penalizes them solely for exercising this fundamental right, and thus subjects the infringement to strict constitutional scrutiny. Strict review is thus required here not only because a suspect classification is involved, but also because the Tennessee voter waiting periods infringe on two fundamental constitutional liberties.

III. THE COMPELLING STATE INTEREST STANDARD UNEQUIVOCALLY REQUIRES THE RESULT REACHED BY THE DISTRICT COURT BELOW

Under the compelling state interest formula, the equal protection inquiry must proceed at three levels. **See Williams v. Rhodes**, 393 U. S. 23 (1968). First, the court must look at the goals the state asserts on behalf of the restrictive classification. If these objectives are constitutionally permissible, then the court must determine whether they are drawn with such precision as not to curtail more of the liberties involved than is absolutely necessary. Finally, if the aim is found to be legitimate, and the means adopted to achieve the legislative policy are the least restrictive possible, then the state still must

show that the legitimate interest is sufficiently compelling to justify the infringement on fundamental liberties. Thus, to summarize, the court must examine the restriction to determine whether it is **necessary** to promote not only a legitimate but a compelling state interest. **Kramer v. Union Free School District,** 395 U. S. 621 (1969); **Williams v. Rhodes,** 393 U. S. 23 (1968).

There is some evidence that the statewide waiting period, enacted in 1870 and unchanged since then was a post-Reconstruction attempt at eliminating carpetbaggers from participation in Tennessee politics. To the extent that this remains an element behind the continued imposition of the waiting period, it is an illegitimate legislative objective. Deterring in-migration, even if political in nature, is not constitutionally allowable. **Shapiro v. Thompson,** 394 U. S. 618 (1969). To the extent that the state interest asserted is that of "educational probation . . . to . . . identify [new residents] with the wants and interests of the people with whom [they] propose to live," **Cook v. State,** 90 Tenn. 407 (Pickle) (1891), it also is an impermissible state policy goal. This Court made it "perfectly clear" in **Carrington v. Rash,** 380 U. S. 89, 93-94 (1965) that " '[f]encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." This position is supported by Justice Marshall in his dissent in **Hall v. Beals,** 396 U. S. 45, 53 (1969). If the alleged state interest in an informed electorate is defined in terms of requiring of its voters "a period of residency sufficiently lengthy to impress upon them the local viewpoint", then clearly this indoctrination is an impermissible justification. **Hall v. Beals,** 396 U. S. 45, 54 (1969) (Marshall, J. dissenting). In view of the literacy test proscription of the Voting Rights Act (prohibiting any test or device which is designed to enforce a knowledgeability requirement on the exercise of the franchise) it is doubtful whether even the

state's interest in a voter's intelligence and ability to learn about political issues is still legitimate. **Lassiter v. Northampton County Bd. of Elections**, 360 U. S. 45 (1959) upheld a state's constitutional right to impose some literacy standards as a prerequisite to voting, but Tennessee has not sought to distinguish among any of its bona fide residents on the basis of literacy; reliance on this justification at this point, especially in light of the Voting Rights Act of 1970, is unpersuasive and far from necessary or compelling even of permissible. **See United States v. Arizona**, 39 U. S. L. W. 4027 (U. S. Dec. 21, 1970).

The only policy interest that the District Court found legitimate was prevention of fraud. The Court did not have to decide whether the interest was a compelling one; assuming for the sake of argument that prevention of voter fraud (double voting, colonization, and voter identification) was a compelling interest, the Court found that the durational residency requirements were not necessary to achieve this asserted state interest. Durational residency requirements in Tennessee pre-date the introduction of voter registration. Statewide registration did not come about until 1951. Acts of 1951, ch. 75. Prior to that, durational residency was used as a gross means of maintaining the "purity of the ballot". But with the system of registration, the durational residency period became functionless, a vestigial remnant which served only to disfranchise thousands of new Tennessee residents each year. Even the theory behind durational residency requirements as a tool for preventing fraud is misguided. Combating voting fraud means weeding out nonresidents from residents, not distinguishing new residents from longtime residents; but the system of durational residency does not achieve this goal. As this Court pointed out in **Shapiro v. Thompson**, 394 U. S. 618, 636 (1969); "The residence requirement and the one-year waiting period requirement are distinct and independent prerequisites . . ." But even if duration of

residency were permissible as establishing a so-called objective standard of residency—a principle rejected in **Shapiro**—it would fail in its mission of thwarting voting fraud. Justice Marshall makes this point very well:

> The nonresident, seeking to vote, can as easily falsely swear that he has been a resident for a certain time, as he could falsely swear that he is presently a resident. The requirement of the additional element to be sworn—the duration of residency—adds no discernible protection against "dual voting" or "colonization" by voters willing to lie.

Hall v. Beals, 396 U. S. 45, 54 (1969) (Marshall, J. dissenting).

Thus, under the compelling state interest standard, Tennessee's durational residency period for voting must fall as a violation of equal protection under the fourteenth amendment. Either the interests purported to be served by the restriction on the franchise are illegitimate, or they are so overbroad as not to be necessary to promote any interest at all. For this reason, the opinion of the District Court should be affirmed.

IV. EVEN UNDER THE TRADITIONAL EQUAL PROTECTION STANDARD, TENNESSEE'S DURATIONAL RESIDENCY PROVISIONS ARE UNCONSTITUTIONAL BECAUSE THEY BEAR NO RATIONAL RELATIONSHIP TO ANY LEGITIMATE GOVERNMENTAL INTEREST.

Those District Courts which have recently upheld durational residency periods for voting have found that the appropriate standard of review under equal protection is the so-called traditional test. Where traditional review is applied, the courts need only find some rational connection between the legitimate state policy objective and the

means selected to achieve that objective. **McGowan v. Maryland**, 366 U.S. 420, 425-26 (1961). In a recent case concerning maximum grants for welfare recipients, this Court held that traditional review is the proper equal protection standard "[i]n the area of economics and social welfare." **Dandridge v. Williams**, 397 U. S. 471 (1970). The concurring opinion of Justice Harlan makes it clear that the traditional test is inapplicable in cases such as the one at bar where fundamental interests are involved. He concurred specially on the ground that the traditional test was applicable in all equal protection adjudication, explicitly acknowledging that the other members of the majority limited the holding to matters of economics and social welfare, and implicitly recognizing that the dissenters would apply strict review even more broadly. In view of this, it is difficult to understand how the minority of District Courts could find the traditional test appropriate in cases where the fundamental rights of voting and travel were infringed, especially, as in **Baker v. Carr**, 369 U. S. 18 (1962), the local political process could not afford adequate protection of the interests of new residents. **See United States v. Arizona**, 39 U. S. L. W. 4027, 4035 (U. S. Dec. 21, 1970) (Stewart, J., concurring).

Nevertheless, even if this minority position is accepted, the rational connection test still requires the invalidation of Tennessee's voting waiting periods. As Appellee has already argued there is no rational basis for believing that the waiting period weeds out nonresidents who seek to violate the "purity of the ballot." Anyone willing to swear falsely and commit a criminal offense will not likely be deterred by having to swear additionally that he has lived in Tennessee for one year and in a county for three months. Once he decides to lie about being a bona fide resident, a fraudulent voter is no less likely to swear falsely about the duration of his residence. And there is no procedure, other than affidavit, by which the county

election commissions attempt to verify the bona fides of new registrants who swear that they have met the waiting period. In short, the durational element of the residency requirement is designed to accomplish nothing with respect to insuring the "purity of the ballot", the District Court below so found, and this Court should affirm.

V. THE TENNESSEE DURATIONAL RESIDENCY REQUIREMENT FOR VOTING IS A CONCLUSIVE PRESUMPTION OF PLAINTIFF'S INABILITY TO MAKE INTELLIGENT USE OF THE BALLOT AND IS THEREFORE A VIOLATION OF DUE PROCESS OF LAW BECAUSE IT BEARS NO REASONABLE RELATIONSHIP TO THE OBJECTIVE SOUGHT.

Conclusive presumptions which have a substantial adverse impact on the exercise of constitutional rights are not looked upon with favor by the courts. **Aptheker v. Secretary of State**, 378 U.S. 500 (1964); **Carrington v. Rash**, 380 U. S. 89 (1965); **United States v. Robel**, 389 U. S. 258 (1967); **Leary v. United States**, 395 U. S. 6 (1969). Thus, in **United States v. Provident Trust Co.**, 291 U. S. 272, 281-82 (1933), this Court in invalidating a conclusive presumption, observed that

> [t]he rule in respect of irrebuttable presumptions rests upon grounds of expediency or policy so compelling in character as to override the generally fundamental requirement of our system of law that questions of fact must be resolved according to the proof.

The Tennessee durational residency requirements for voting establish an irrebuttable presumption that plaintiff, and members of the class he represents, cannot qualify to participate in the state's electoral process, much as Texas forbade "a soldier ever to controvert the presumption of non-residence." **Carrington v. Rash**, supra, at 96.

There is no reason for Tennessee to exclude new residents from its eligible electorate solely because they are recent arrivals. Indeed, such a purpose would be constitutionally impermissible as a penalty on the right of free travel. **Shapiro v. Thompson**, 394 U. S. 618, 631 (1969); **United States v. Jackson**, 390 U. S. 570, 581 (1968). There must be some other basis on which to explain the restrictive classification. It must stand as a surrogate, a proxy, for some other concern of the state. In serving this role, it acts as a conclusive presumption, and must be analyzed constitutionally as such, regardless of whether it is conceptualized as a rule of evidence or a substantive principle of law.

> [W]hether the . . . presumption be treated as a rule of evidence or of substantive law, it constitutes an attempt, by legislative fiat, to enact into existence a fact which here does not, and cannot be made to exist in actuality . . . This court has held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment. **Heiner v. Donnan**, 285 U. S. 312, 329 (1932).

Under due process, there are two criteria which the statutes must meet: 1) where "matters close to the core of our constitutional system" are involved, the state's presumption must achieve the objective it purports to further in the least restrictive way possible; **Shelton v. Tucker**, 364 U. S. 479, 488 (1960); **United States v. Robel**, 389 U. S. 258 (1967); and 2) there must be a rational connection between the fact proved and the fact presumed. **Leary v. United States**, 395 U. S. 6 (1969). That the state can achieve any of its legitimate objectives by less drastic infringements on Appellee's right to vote has already been demonstrated. Appellee further asserts that there is no rational connection between durational residency re-

quirements and voting qualifications, and that this nexus must be shown to support a statutory presumption in the face of a challenge under due process.

In **Heiner v. Donnan**, 285 U. S. 312 (1932), the Supreme Court said that failure to give a party an opportunity to amass facts that show the irrationality of a statutory presumption violated due process. The Court noted that medical science had advanced, and assumptions that might once have been reasonable could no longer withstand analysis, given the more sophisticated medical knowledge available when the case was decided. Cf. **Manley v. Georgia**, 279 U. S. 1, 6 (1928). In **Leary v. United States**, 395 U. S. 6 (1969), this Court specifically stated that the determination of a presumption's constitutionality is a highly empirical matter.

> A statute based upon a legislative declaration of facts is subject to constitutional attack on the ground that the facts no longer exist; in ruling on such a challenge a Court must, of course, be free to re-examine the factual declaration. 395 U. S. at 38, n. 68.

In **Leary**, Justice Harlan cited evidence that marijuana grew in great quantities in the United States and used this to show the irrationality of a presumption that mere possession of marijuana was presumptive of illegal import. Cf. **Tot v. United States**, 319 U. S. 463 (1943).

Although the District Court found that the state's interest in a knowledgeable electorate was neither demonstrated nor constitutionally legitimate, the state asserts, as a justification for retaining durational residency requirements, its desire to promote the "intelligent use of the ballot". The state, however, can point to no other example of where it attempts to promote this same interest. Moreover, by discriminating against bona fide residents who are newcomers in the state or in their present

county, the state selects an arbitrary group on which to impose a knowledgeability standard. Perhaps "against the backdrop of mid-nineteenth century circumstances, residency requirements were well-conceived," but "[i]n light of a mid-twentieth century perspective . . . [they] . . . are obsolete." Macleod and Wilberding, **State Voting Residency Requirements and Civil Rights**, 38 Geo. Wash. L. Rev. 93, 95 (1969).

The State has mustered no evidence to show that interstate movers, as a group, are less well informed than non-movers. Nor has there been any showing that new residents, as a group, actually know less about the issues or candidates involved in an election, provided they establish residency while the registration books are still open (30 days before election day). In short, the state has made no showing of any empirical evidence to support the conclusive presumption which the durational residency requirement enforces.

On the other hand, there is strong evidence to rebut the state's empirical position. As a group, movers tend to be more highly educated than non-movers. U. S. Bureau of Census, **Current Population Reports** Series P-20, No. 192, "Voting and Registration in the Election of November 1968," Table 16 at p. 47; U. S. Bureau of Census, **U. S. Census of Population: 1960. Subject Reports, Mobility in Metropolitan Areas.** Final Report Pc (2)-2c, Table 1 at P. 9. And the assumption that the better a person's educational background, the more likely he is to participate actively in public life is well supported by common experience. Moreover, the revolution in communications with the development of radio and television has facilitated the flow of information in a manner unforeseeable in 1796, when the county waiting period was first enacted, or in 1870, when the statewide waiting period was adopted for the first time. Finally, it would be difficult to uphold the

rationality of this exclusion for Tennessee, a state which ranks 47th among the states in per pupil expenditure on education. At a time when direct broadcast from the moon is a reality, it seems anachronistic to assume that the only way to learn about political issues and candidates is by physical presence in a place for one year or three months.

Therefore, since there is no demonstrated, or demonstrable nexus between length of residency and ability to cast an intelligent vote, and since the deprivation of the rights of plaintiff and other members of his class by the conclusive presumption is extreme, the durational residency provisions with respect to voting are unconstitutional as a violation of due process under the Fourteenth Amendment.

VI. CONCLUSION

Because the waiting period for voting violates both the equal protection and due process guarantees of the fourteenth amendment, and because the opinion of the District Court is so clearly correct and supported by the weight of authority, this Court should affirm its decision.

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